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Supreme Court of the United States

OCTOBER TERM, 1967

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No. 986

WHEATLAND HILLS CORP., a Delaware Corporation,
Petitioner,

v.

MARGARET F. MORTON, *Respondent.*

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The two sentence opinion of the court below states a view of the judicial power of a court of general jurisdiction. Petitioner has asserted that this view is in violation of the United States Constitution, under prior decisions of this Court, and that since many other states have followed this same erroneous view of judicial power, this case should be reviewed by this Court.

In her lengthy Brief in Opposition, respondent has attacked the jurisdiction of this Court to consider this case based upon two grounds: (a) that the petition was untimely filed because petitioner sought review by certiorari in the Supreme Court of Florida (Respondent's Brief, pp. 53-56); and (b) that petitioner allegedly lacks standing under state law to assert the constitutional issue herein, which, it is contended, constitutes an "adequate state ground" to support the decision of the District Court of Appeal below. (Respondent's Brief, pp. 43-53). Petitioner submits that both of these arguments are wholly without merit under applicable state law and procedure, and the practice and procedure of this Court.

A. The Timeliness of the Petition

We deal first with respondent's contention regarding the timeliness of the Petition herein, which is based upon the jurisdictional relationship of the Supreme Court of Florida with the Florida District Courts of Appeal, under Florida law.

The respondent's challenge, simply stated, is that petitioner, by exhausting all possibilities of state court review and filing a timely petition for certiorari to the Supreme Court of Florida from the decision of the District Court of Appeal, thereby lost its right to seek review of that decision in this Court. The Petition herein is said to have been filed more than 90 days after the final judgment below.

Petitioner sought review in the Supreme Court of Florida under Article 5, Section 4 of the Constitution of Florida, which provides:

> "The supreme court may review by certiorari any decision of a district court of appeal * * * that is in direct conflict with a decision of another dis-

trict court of appeal or of the supreme court on the same point of law * * *."

The Supreme Court of Florida has stated in answer to questions of Florida appellate procedure certified to it by this Court in *Dresner* v. *City of Tallahassee,* 164 So. 2d 208 (Fla. 1964) that:

> "We contribute an additional observation regarding a possible review of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the instant case. Under Florida constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. * * * *To this extent complete exhaustion of Florida's appellate processes would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked."* 164 So. 2d at 212 (Emphasis added).

Petitioner asserted several instances of "direct conflict" with the District Court's "decision" on "points of law" within the meaning of those terms as construed by the Florida courts[1] in its petition to the Supreme Court of Florida, which petition is part of the record herein at pp. 440-450. Petitioner believed in good faith that a "direct conflict" within the meaning of the Florida Constitution existed between the decision of the District Court below and prior Florida decisions

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[1] See, e.g., *McBurnett* v. *Playground Equipment Corp.*, 137 So. 2d 563, 565 (Fla. 1962); *State* v. *Moore's Estate,* 153 So. 2d 819 (Fla. 1963); *Young Spring and Wire Corp.* v. *Smith,* 176 So. 2d 903 (Fla. 1965); *Seaboard Airline R. Co.* v. *Branham,* 104 So. 2d 356 (Fla. 1958).

on several "points of law," but in all events, until the Florida Supreme Court had acted, the existence of such "direct conflict" was surely arguable. Under these circumstances, petitioner was required to seek such review under the jurisdictional statute and decisions of this Court requiring a decision from "the highest court of a State in which a decision could be had." 28 U.S.C. § 1257; *Stratton* v. *Stratton,* 239 U.S. 55 (1915).

The Supreme Court of Florida having denied certiorari, under the decisions of this Court the decision of the District Court of Appeal became the reviewable decision, *Sullivan* v. *Texas,* 207 U.S. 416 (1908). As stated in *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 21 (1923):

> "Of course the limit of time for applying to the Court was from the date when the writ of certiorari was refused."

The Supreme Court of Florida denied the writ of certiorari on October 11, 1967, and the petition for certiorari was filed herein on January 3, 1968, well within the 90 day limitation period.[2]

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[2] Several of the recent cases in which jurisdiction has been assumed by this Court which have arisen from the Florida Courts have identical procedural histories with the case at bar. For example, in *Simons* v. *Miami Beach First National Bank,* 381 U.S. 81 (1965), the District Court of Appeal denied rehearing on November 22, 1963, 157 So. 2d 199; a petition for certiorari was taken to the Supreme Court of Florida, which denied certiorari in May, 1964, 166 So. 2d 151; and the petition for certiorari, which was granted by this Court, was filed on August 10, 1964, 33 U.S. Law Week 3065, within 90 days of the denial of certiorari by the Florida Supreme Court, but almost nine months after the District Court of Appeal decision. *Brooks* v. *Florida,* 389 U.S. 413 (1967), had an identical procedural background.

It should be noted that the decision of the District Court of Appeal in this case was an affirmance in an *appeal* from a trial court, and not a denial of *certiorari* without opinion, as in *Callendar* v. *State,* 181 So. 2d 529 (Fla. S.Ct. 1966), and *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 237 (1967), where this Court stated in footnote 1:

> "The Florida Supreme Court seems to have decided that it lacks jurisdiction by appeal to consider *per curiam* denials of certiorari by the Florida District Court of Appeal."

Thus, petitioner properly exhausted all possibilities of state court review and its Petition to this court was timely filed.

B. Petitioner's Standing To Raise Constitutional Issue

We deal next with respondent's argument regarding petitioner's alleged lack of standing under state law to raise the question here presented. Such lack of standing, it is said, constitutes an "adequate state ground" upon which the lower courts might have based their decisions and, as a result, respondent contends that the constitutional issue is "Not Necessary and Unavoidable." (Respondent's Brief, p. 43).

Examination of the opinions of the Dade Circuit Court below (Appendix C to Petition for Certiorari, pp. App. 4-App. 13, particularly at pp. App. 8-App. 10), together with the opinion of the District Court of Appeal, (Appendix B to Petition for Certiorari, pp. App. 2-App. 3) reveal that the State courts squarely entertained and decided the federal question before them and did *not* decide this case on any independent state ground, although respondent argued petitioner's al-

leged lack of standing under state law at similar length in the courts below.

The reason for the state courts' rejection of the lack of standing argument was simply that the argument had no substance under state law.

Petitioner Wheatland Hills Corp.'s title to the property upon which levy is sought in the present case was obtained almost a year prior to the rendition of the alimony judgment against Richard Morton in Sarasota (R. 195). The enforcement of the Sarasota judgment obtained against Wheatland Hills Corp.'s grantor, Richard Morton, by levy upon its property, obviously and substantially affected *its* rights which had been obtained long prior to the rendition of the Sarasota judgment. If the Sarasota judgment is a void judgment for lack of jurisdiction, as petitioner has consistently asserted, petitioner has every right under Florida law to collaterally attack the judgment:

> "A grantee of land from one having outstanding against her a void judgment may maintain a bill in equity to cancel a void judgment as a cloud upon its title to the land." *Protective Holding Corporation* v. *Cornwall Co.*, 127 Fla. 252, 173 So. 804 (1936).

See also, *Napoleon B. Broward Drainage Dist.* v. *Certain Lands,* etc., 160 Fla. 120, 33 So. 2d 716, 718 (1948); *Hennig* v. *Hennig,* 162 So. 2d 288 (3rd Dist. Fla. 1964).[3]

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[3] Although respondent states in her brief at page 46 that "Richard Morton could not make that attack [collateral attack on the Sarasota final decree] since he had actual notice and declined the opportunity to defend that was afforded to him. . . .", this is clearly not the law of Florida. "The defect in the divorce proceeding, as far as concerns divesting the husband's interest in the real property, was jurisdictional subject to collateral attack." *Hennig* v. *Hennig,* 162 So. 2d at 289.

This state law is in accordance with the Restatement of Judgments, which provides:

> "Where the proceeding in which the judgment is rendered is a proceeding in rem or quasi in rem (see §§ 32-40), and the judgment is void, it is open to a collateral attack. Such a judgment has no effect on property interests which are the subject matter of the proceeding * * * " Section 11, Comment g, p. 69.

Even the case relied upon by respondent as establishing some "quasi-estoppel" against petitioner, *Gaylord* v. *Gaylord,* 45 So. 2d 507 (Fla. S.Ct. 1950) (quoted at pp. 46-47 of Respondent's Brief), is simply inapposite, for as the court there stated:

> " * * * [N]ot 'all strangers are entitled to impeach a judgment. * * * They are by law allowed to impeach it whenever it is attempted to be enforced against them *so as to effect rights or interests acquired prior to its rendition.*' " (Emphasis in original). 45 So. 2d at 509.

A further answer to respondent's "adequate state ground" argument is that it is simply inapplicable to this case under any view of the record or Florida state law. This is because, as stated by this Court in *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95 at 98 (1938):

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment, if, as here, it is a final judgment."

See also, *Grayson* v. *Harris,* 267 U.S. 352, 358 (1925); *Virginia* v. *Imperial Cool Sales Co.,* 293 U.S. 15, 16-

17 (1934); *International Steel and Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936); *Steele* v. *Louisville and N.R. Co.*, 323 U.S. 192, 197, n. 1 (1944).[4]

If, as this Court held in *Pennoyer* v. *Neff*, 95 U.S. 714 (1878), and *Pennington* v. *Fourth National Bank*, 243 U.S. 269 (1917), a " * * * seizure at the commencement of proceedings" is required as an "essential" of due process of law in order to vest a court with jurisdiction, mere knowledge of the Sarasota proceeding did not require Wheatland Hills Corp. any more than Richard Morton to enter into a proceeding in which it, as well as he, had not been personally served with process. Nor had its property been seized or brought into *custodia legis* prior to the rendition of the Sarasota alimony decree.

CONCLUSION

In respondent's Brief, the constitutional issue does come to the surface once. Petitioner submits that this Court should grant certiorari to consider whether, in respondent's own words, "A notice of suit duly issued specifically describing the non-resident husband's property within the state as property being proceeded against and sought to be subjected to the lien of the decree to be rendered in favor of the wife and children constitutes a seizure and makes the proceeding one in rem against such duly described property" (Respondent's Brief, p. 41). To that formulation of the

[4] "But if the state court in terms bases its decision upon a determination of the federal question, the argument will not be heard in an attempt to defeat the jurisdiction of the Supreme Court, that the state court might have based its decision, consistently with the state of the record, upon an independent and adequate ground." Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 91, p. 169 (Wolfson and Kurland ed., 1951).

constitutional issue petitioner would add only: "where the wife claims no preexisting interest in the property."

Thus, the issue is nothing more complicated than whether a "notice" constitutes a "seizure". Petitioner submits that this Court has held in *Pennoyer* and *Pennington* that a constructive notice is not a seizure of property, and that certiorari is clearly essential where the state courts generally (See Petition pp. 16-17) and steadfastly refuse to adhere to these principles in the context of divorce and alimony as the decision of the court below exemplifies.

For these reasons, supplementing those in the Petition, certiorari should issue to review the judgment below.

Respectfully submitted,

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